Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The Line Item Veto Act, 2 U.S.C. 691 *et seq.*, gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether the appellees in this case have standing to challenge the constitutionality of the Act.

2. Whether the Act violates Article I of the Constitution or principles of separation of powers.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William J. Clinton, the President of the United States; Donna E. Shalala, the Secretary of Health and Human Services; Franklin D. Raines, the Director of the Office of Management and Budget; and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are the City of New York; the New York City Health and Hospitals Corporation; the Greater New York Hospital Association; the Jamaica Hospital Medical Center; District Council 37, American Federation of State, County, and Municipal Employees; Local 1199, National Health and Human Service Employees Union; Snake River Potato Growers, Inc.; and Mike Cranney.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-33a) is not yet reported.

JURISDICTION

The order of the district court was entered on February 12, 1998. A notice of appeal (App., *infra*, 34a-35a) was filed on February 13, 1998. The jurisdiction of this Court is invoked under 2 U.S.C. 692(b) (Supp. II 1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, provides as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

2. The Line Item Veto Act, 2 U.S.C. 691 *et seq.* (Supp. II 1996), is reproduced at App., *infra*, 36a-60a.

3. Section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 515, is reproduced at App., *infra*, 72a.

4. Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 895-896, is reproduced at App., *infra*, 72a-74a.

STATEMENT

This case involves a challenge to the constitutionality of the Line Item Veto Act. In the proceedings below, the District Court for the District of Columbia ruled that the Act violates Article I of the Constitution and principles of separation of powers. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. 2 U.S.C. 692(b) (Supp. II 1996).

1. The Line Item Veto Act gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The Act is the latest in a series of statutes, dating from 1789 to the present, in which Congress has given the Executive Branch discretion over the expenditure of appropriated funds.

a. The first statute appropriating funds for the general operation of the federal government was passed by the First Congress and signed by President Washington in September 1789. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The statute appropriated "sum[s] not exceeding" specified amounts for the expenses of the War Department, government salaries, military pensions, and outstanding debt. *Ibid.* The First Congress subsequently enacted two additional general appropriations statutes, which likewise appropriated "sum[s] not exceeding" specified amounts for the government's operations. Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L. J. 1549, 1579 (1974).

The appropriations acts of the First Congress gave the President two distinct kinds of discretion over appropriated funds, both of which have become familiar elements of the federal budget process. First, by appropriating sums "not exceeding" specified amounts, Congress gave the President discretion not to obligate the full amount of the appropriations. It has since become a commonplace of federal appropriations law that an appropriation "not exceeding" a specified sum leaves the Executive Branch with discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. See, *e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity."); 89 Cong. Rec. 10,362 (1943) (Sen. Truman) ("When the Congress appropriates funds * * * none of us hold[s] that we give a mandate to expend the funds appropriated.").

Second, the appropriations acts of the First Congress provided Executive Branch departments with what are now known as "lump-sum" appropriations—that is, appropriations for the operation of a department that do not specify the particular items for which the funds are to be used. For example, the first appropriations act appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The Act did not prescribe any particular expenditures to be made by the President from that appropriation. As a result, the President was given discretion not only with respect to the amount of the appropriated sum that would be used, but also with respect to its allocation

within the Department of War. This Court recently reaffirmed that, "where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that [Congress] does not intend to impose legally binding restrictions" on the allocation of the funds among authorized purposes. *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) (internal quotation marks omitted). The use of lump sum appropriations has since become a common mechanism in circumstances where Executive Branch discretion and flexibility are viewed as desirable, especially during periods of economic and military crisis. See, *e.g.*, Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 136 (1972).

Early in the Twentieth Century, Congress began to enact laws that gave the Executive Branch standing authority to control spending on a government-wide basis. In 1905 and 1906, Congress amended the Antideficiency Act (Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251) to give agencies authority to apportion appropriations over the course of a fiscal year, while authorizing them to modify or waive apportionments in exigent circumstances. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257-1258; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48-49.

In 1933, in response to the fiscal pressures created by the Great Depression, Congress granted the President broad discretion to refrain from spending appropriated funds. See Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415)); see also Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602. In 1950, Congress amended the Antideficiency Act to provide

the Executive Branch with general authority to establish "reserves"—that is, to withhold appropriated funds—in order "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments." General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-766. Congress directed the Executive Branch to "recommend the rescission" of any reserves "not * * * required to carry out the purposes of the appropriation concerned." *Id.* at 766. More recently, during the Vietnam War, Congress gave the President still greater discretionary authority over expenditures of appropriated funds. See Abascal & Kramer, *supra*, 62 Geo. L.J. at 1569 & n.90; Fisher, *supra*, 37 Law & Contemp. Probs. at 160-161.

b. In each of the foregoing instances, the Executive Branch was authorized by statute to withhold appropriated sums. During the early 1970s, however, President Nixon asserted a general authority to impound appropriated funds whether or not Congress intended for the impounded appropriations to be discretionary. See, *e.g.*, 9 Weekly Comp. Pres. Doc. 110 (1973). The Nixon Administration's effort to impound appropriations for a wide range of federal programs led to a series of lawsuits challenging individual impoundments. See, *e.g.*, *City of New Haven* v. *United States*, 634 F. Supp. 1449, 1454-1455 & n.6 (D.D.C. 1986) (summarizing cases), aff'd, 809 F.2d 900 (D.C. Cir. 1987); Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 Geo. L.J. 149, 151-168 (1974); Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 Neb. L. Rev. 1, 14-30 (1974).

In response to the impoundment controversy, Congress enacted the Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*). The ICA distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year, or other period of availability) and rescissions (permanent withholdings of appropriated funds). See 2 U.S.C. 682(1), 682(3). The ICA authorized the President to carry out deferrals, subject to a one-House legislative veto. 2 U.S.C. 684 (1982).[1] However, the ICA prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982). In addition, the ICA amended the Antideficiency Act to narrow the circumstances in which the Executive Branch could place appropriated funds in reserves. See ICA § 1002, 88 Stat. 332.

2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200, 2 U.S.C. 691 *et seq.* (Supp. II 1996) (App., *infra*, 36a-60a). The Act expires on January 1, 2005. 2 U.S.C. 691 note (Supp. II 1996). It authorizes the President to "cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law

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[1] This Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), made clear that the ICA's legislative veto provision was unconstitutional. See *City of New Haven* v. *United States*, 809 F.2d 900, 905 (D.C. Cir. 1987) (government conceded unconstitutionality of legislative veto provision). Congress subsequently amended the ICA to eliminate that provision. Act of Sept. 29, 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786.

pursuant to Article I, section 7, of the Constitution of the United States." 2 U.S.C. 691(a) (Supp. II 1996).

The President's cancellation authority extends to three categories of budget items: (1) "dollar amount[s] of discretionary budget authority," (2) "item[s] of new direct spending," and (3) "limited tax benefit[s]." 2 U.S.C. 691(a) (Supp. II 1996). A "dollar amount of discretionary budget authority" is "the entire dollar amount of budget authority" that is specified in an appropriations law or is otherwise specified, represented, or required to be spent. 2 U.S.C. 691e(7)(A) (Supp. II 1996). An "item of new direct spending" is a specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through annual appropriations. 2 U.S.C. 691e(8) (Supp. II 1996).[2] A "limited tax benefit" is a revenue-losing provision that affords a tax reduction to 100 or fewer beneficiaries, or a provision that affords "temporary or permanent

[2] The Act defines the term "direct spending" to include "(A) budget authority provided by law (other than an appropriation law); (B) entitlement authority; and (C) the food stamp program." 2 U.S.C. 691e(5) (Supp. II 1996). An "item of new direct spending" is a provision of law estimated to result in direct spending in excess of the "baseline" levels calculated pursuant to Section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. 907. See 2 U.S.C. 691e(8) (Supp. II 1996); see also H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 36 (1996). An increase in outlays for such entitlements resulting from automatic cost-of-living or comparable adjustments under *existing* law is in the "baseline" and therefore is not an item of "new" direct spending under the Line Item Veto Act.

transitional relief" to ten or fewer beneficiaries. 2 U.S.C. 691e(9) (A) (Supp. II 1996).[3]

Cancellation of a dollar amount of discretionary budget authority operates "to rescind" that authority. 2 U.S.C. 691e(4)(A) (Supp. II 1996). Cancellation of an item of new direct spending or a limited tax benefit renders the cancelled spending or revenue provision without "legal force or effect." 2 U.S.C. 691e(4)(B) and (C) (Supp. II 1996). The President may not use funds covered by a cancellation for any purpose other than deficit reduction. 2 U.S.C. 691b(b), 691c (Supp. II 1996). Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Director of the Office of Management and Budget (OMB) must estimate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. 2 U.S.C. 691c(a) and (b) (Supp. II 1996).

If the President wishes to exercise his cancellation authority, he must submit a special message to Congress within five calendar days (excluding Sundays) after the enactment of the law containing the cancelled item. 2 U.S.C. 691(a)(B), 691a(c)(1) (Supp. II 1996). The President may cancel an item only if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national

[3] The Act provides for the Joint Committee on Taxation to identify limited tax benefits in future revenue bills. 2 U.S.C. 691f(a) (Supp. II 1996). If Congress incorporates the Joint Committee's statement into a revenue law as finally enacted, the President's authority to cancel limited tax benefits is confined to the items, if any, identified in that law. 2 U.S.C. 691f(b) and (c) (Supp. II 1996).

interest." 2 U.S.C. 691(a)(A) (Supp. II 1996). The President must also consider "the legislative history, construction, and purposes of the law" containing the items, as well as "any specific sources of information referenced in such law." 2 U.S.C. 691(b)(1) and (2) (Supp. II 1996). In addition, the President's special message to Congress must identify, *inter alia*, the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; his estimate of "the * * * effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and the geographic distribution of the cancelled spending. 2 U.S.C. 691a(b) (Supp. II 1996).

A cancellation takes effect upon Congress's receipt of the President's special message. 2 U.S.C. 691b(a) (Supp. II 1996). The Act provides for highly expedited consideration by Congress of "disapproval bills." 2 U.S.C. 691d, 691e(6) (Supp. II 1996). If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. 2 U.S.C. 691b(a) (Supp. II 1996). A disapproval bill is not subject to the President's cancellation authority under the Act. 2 U.S.C. 691(c) (Supp. II 1996).

Although the Line Item Veto Act establishes general rules for the execution of appropriations laws, nothing in the Act purports to prevent Congress from exempting any subsequent spending or revenue bill (or portion thereof) from the operation of the Act by including a provision to that effect in the bill itself. This Court has recognized that Congress may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act." *Raines* v. *Byrd*, 117 S. Ct. 2312, 2320 (1997).

3. The Line Item Veto Act took effect on January 1, 1997. See 2 U.S.C. 691 note (Supp. II 1996). Immediately thereafter, several Members of Congress filed an action for declaratory relief, contending that the Act violates Article I of the Constitution and principles of separation of powers. The suit was filed under the Act's judicial review provision, which states that "[a]ny Member of Congress or any individual adversely affected" by the Act "may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of [the Act] violates the Constitution." 2 U.S.C. 692(a)(1) (Supp. II 1996).[4]

The district court entered judgment in favor of the plaintiffs, holding that they had standing and that the Act is unconstitutional. *Byrd* v. *Raines*, 956 F. Supp. 25 (D.D.C. 1997). The government appealed to this Court pursuant to 2 U.S.C. 692(b) (Supp. II 1996), which provides that orders issued in actions challenging the constitutionality of the Act "shall be reviewable by appeal directly to the Supreme Court." After noting probable jurisdiction (117 S. Ct. 1489 (1997)), this Court vacated the judgment of the district court without reaching the merits, holding that the plaintiff Members of Congress lacked standing under Article III of the Constitution to challenge the constitutionality of the Act. 117 S. Ct. 2312 (1997).

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[4] A similar constitutional challenge was brought by a federal labor union immediately after the Act was signed into law in April 1996. That action was dismissed on standing and ripeness grounds. See *National Treasury Employees Union* v. *United States*, 101 F.3d 1423 (D.C. Cir. 1996).

4. At the time of this Court's decision in *Raines* v. *Byrd*, the President had not yet canceled any spending or revenue item pursuant to the Act. Since then, the President has exercised his cancellation authority on several occasions. The present litigation arises out of two specific cancellations.

a. The first cancellation involves a spending provision that granted the State of New York preferential treatment regarding federal payments under the Medicaid program. States that participate in the Medicaid program receive matching funds from the federal government, which are based on a State's allowable medical assistance expenditures. See generally 42 U.S.C. 1396b(a). The amount of a State's allowable medical assistance expenditures is reduced by the revenue that the State receives from health care related taxes unless, *inter alia*, the taxes are "broad based." 42 U.S.C. 1396b(w)(1)(A)(ii). If a particular health care related tax does not satisfy the statutory criteria for "broad based" taxes (see 42 U.S.C. 1396b w(3)(B)), the State may apply to the Secretary of Health and Human Services for a waiver, pursuant to which the Secretary will "treat [the] tax as * * * broad based" if it satisfies other criteria. 42 U.S.C. 1396b(w)(3)(E). The waiver application is reviewed by the Health Care Financing Administration (HCFA) in the Department of Health and Human Services, and HCFA's determination is subject to review by the Departmental Appeals Board. App., *infra*, 7a.

In 1994, HCFA notified the State of New York that certain health care related taxes levied by the State are not "broad based" and therefore must be taken into account in calculating the State's federal Medicaid payment. See App., *infra*, 7a. The State subsequently filed over 60 applications for waivers.

Ibid. As of this date, no formal action has been taken by HCFA on any of New York's pending waiver applications. *Ibid.* While the applications remain pending, the state taxes at issue are disregarded in determining New York's allowable medical assistance expenditures. See Brown Decl. ¶ 7. As a result, no reduction in federal Medicaid payments to New York has yet taken place. *Ibid.*

On August 5, 1997, the Balanced Budget Act of 1997 was enacted into law. Pub. L. No. 105-33, 111 Stat. 251. Section 4722(c) of the Balanced Budget Act provided that health care related taxes collected by New York before June 1, 1997, for which waiver applications were still pending, "are deemed to be permissible health care related taxes and in compliance with the requirements" for broad based taxes under the Medicaid program. 111 Stat. 515; App., *infra*, 72a. On August 11, 1997, the President transmitted to Congress a special message (see pp. 9-10, *supra*) canceling Section 4722(c) as an "item of new direct spending" under the Act. 62 Fed. Reg. 43,262; App, *infra*, 61a-65a.

b. The second cancellation at issue here involves a tax provision that would have given special treatment to a small class of agricultural stock sales. As a general matter, Section 1042 of the Internal Revenue Code permits taxpayers to defer recognition of capital gains from the sale of certain stock to employee stock ownership plans (ESOPs) or eligible worker-owned cooperatives. 26 U.S.C. 1042. The capital gains are not recognized until the taxpayer sells the replacement property purchased with the proceeds of the original sale. Section 1042 thus defers, but generally does not eliminate, the capital gains tax on such transactions. Because the capital gain accrues to the

seller, Section 1042 affects the tax liability of the seller rather than that of the purchaser.

On August 5, 1997, the Taxpayer Relief Act of 1997 was enacted into law. Pub. L. No. 105-34, 111 Stat. 788. Section 968 of the Taxpayer Relief Act extended Section 1042 to cover taxpayers who sell, after December 31, 1997, stock of domestic corporations that are qualified refiners or processors of agricultural or horticultural products to an eligible farmers' cooperative. 111 Stat. 895-896; App., *infra*, 72a-74a. The Taxpayer Relief Act specifically identified Section 968, along with certain other provisions, as "limited tax benefits" for purposes of the Line Item Veto Act. See 111 Stat. 1101. On August 11, 1997, the President transmitted to Congress a special message canceling Section 968 and another provision of the Taxpayer Relief Act. 62 Fed. Reg. 43,265; App., *infra*, 66a-67a, 70a-71a.

c. In October 1997, two suits challenging the constitutionality of the Act were filed in the District Court for the District of Columbia. The first suit, *City of New York* v. *Clinton*, Civ. No. 97-2393 (D.D.C.), challenged the President's cancellation of Section 4722(c) of the Balanced Budget Act of 1997. Although Section 4722(c) concerned federal payments to the State of New York, the State itself is not a party to the suit. Instead, the suit was filed by the City of New York, the New York City Health and Hospitals Corporation, the Greater New York Hospital Association, a local hospital, and two local unions.

The plaintiffs in *City of New York* (appellees in this Court) asserted that the appellee health care providers will be required to pay additional state taxes and assessments if New York's pending waiver

applications are ultimately denied. Complaint ¶ 25. Appellees asserted that the President's cancellation of Section 4722(c) "reinstate[d]" the appellee providers' potential "exposure" to those tax obligations and "burden[ed]" their ability to engage in financial planning and borrowing. Complaint ¶¶ 26-27.

The second suit, *Snake River Potato Growers, Inc.* v. *Rubin*, Civ. No. 97-2463 (D.D.C.), challenged the President's cancellation of Section 968 of the Taxpayer Relief Act of 1997. The plaintiffs in *Snake River* (appellees in this Court) are an Idaho farmers' cooperative and a potato grower who is a member, director, and vice-chairman of the cooperative. Appellees alleged that the cooperative is an "eligible farmers' cooperative" within the meaning of Section 968. Complaint ¶ 7.

The *Snake River* appellees did not assert that the President's cancellation of Section 968 had affected or could affect their own tax liability. Instead, they alleged that the cancellation of Section 968 would make it more difficult, and "generally" more expensive, for the cooperative to purchase the facilities of agricultural processors that are supplied by the cooperative's members. Complaint ¶ 15. Appellees asserted that if Section 968 had not been canceled, it would have allowed a processor to sell its facilities to the cooperative while deferring recognition of any capital gain, which "would have allowed Snake River to offer and would have encouraged a processor to accept a lower price for those facilities." *Ibid.* Appellees also alleged that the cancellation of Section 968 had interfered with one potential transaction that had been under negotiation in expectation of Section 968's enactment. *Id.* ¶ 16.

d. The district court consolidated the *City of New York* and *Snake River* suits into a single proceeding.[5] The government filed a motion to dismiss, contending that the plaintiffs in both cases lack standing under Article III of the Constitution and that their claims are not ripe. While the motion to dismiss was pending, the parties filed cross-motions for summary judgment on the merits. The motions were filed and argued under an expedited schedule, in accordance with 2 U.S.C. 692(c) (Supp. II 1996), which directs the district court and this Court "to advance on the docket and to expedite to the greatest possible extent the disposition of" any suit challenging the constitutionality of the Act.

On February 12, 1998, the district court denied the motion to dismiss and granted summary judgment to appellees in both suits. App., *infra*, 1a-33a. The court first determined that the appellees have standing under Article III. *Id.* at 11a-21a. In *City of New York*, the court reasoned that Section 4722(c) provided a benefit to the appellee health care providers by protecting them from "any [state tax] liability that otherwise might befall them," and that "the President took that benefit away" when he canceled Section 4722(c) of the Balanced Budget Act of 1997. *Id.* at 13a. The court dismissed as irrelevant the fact that New York has applied for administrative waivers and that the providers will not face new state tax liabilities unless the waivers are denied. *Id.* at 13a-14a. The

[5] A third suit challenging the constitutionality of the Act, *NTEU* v. *United States*, Civ. No. 97-2399 (D.D.C.), was also made a part of the consolidated proceeding. However, *NTEU* was subsequently resolved on non-constitutional grounds, and it is not a part of this appeal.

court regarded it as "more likely than not" that New York will be required to refund at least some of its federal Medicaid payment at the conclusion of the administrative process, and deemed it "highly likely" that the providers will be required to indemnify New York for any such repayments. *Id.* at 15a.

In *Snake River*, the court concluded that the President's cancellation of Section 968 of the Taxpayer Relief Act of 1997 caused the appellees "an immediate, concrete injury" because it prevented them from competing "on equal footing" with investor-owned businesses, which are able to structure the acquisition of agricultural processing facilities to give the sellers the tax benefits conferred by Section 1042 of the Internal Revenue Code. App., *infra*, 15a-16a. The court construed this Court's decision in *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), to hold that "the inability to compete on an equal basis in the bidding process is injury in fact." App., *infra*, 16a. The court also found it "likely" that the appellees would have benefited "in a concrete way" from the ability of sellers of agricultural processing facilities to defer capital gains under Section 968. *Id.* at 17a. Although Section 968 governed the tax liability of sellers, rather than that of purchasers, the court concluded that Section 968 would have "allow[ed] [appellees] to pay a lower purchase price" or, "at the very least," would have "give[n] [appellees] some room to negotiate in terms of price." *Id.* at 17a-18a.

On the merits, the district court held that the Line Item Veto Act violates the Presentment Clause of Article I and principles of separation of powers. App., *infra*, 22a-33a. The court acknowledged that "the

initial passage of the Balanced Budget Act and the Taxpayer Relief Act complied with the" requirements of Article I. *Id.* at 24a. The court held, however, that the President's cancellation of individual items contained within those laws was constitutionally infirm because "[t]he laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress." *Ibid.* The court concluded that "[b]ecause the Line Item Veto Act produced laws in violation of the requirements of bicameral passage, because it permitted the President unilaterally to repeal or amend duly enacted laws, and because it impermissibly attempts to evade the requirement that the President sign or reject a bill *in toto*, the Act violates the requirements of Article I." *Id.* at 27a. The court also held that the Act offends separation of powers principles, because it authorizes the President to perform "an inherently legislative function, namely, the authority to permanently shape laws and package legislation." *Id.* at 29a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Line Item Veto Act vests this Court with appellate jurisdiction over district court decisions regarding the constitutionality of the Act. 2 U.S.C. 692(b). This case falls squarely within this Court's appellate jurisdiction under the Act. The district court erred both in holding that the appellees have standing under Article III to challenge the constitutionality of the Line Item Veto Act and in holding that the Act is unconstitutional.

1. The threshold question is whether the appellees satisfy the standing requirements of Article III. This Court has recognized that "when the plaintiff is not himself the object of the government action or

inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). The potential direct beneficiaries of the tax and spending items whose cancellation is at issue here have declined to file suit to challenge the cancellations. The appellees in both suits assert a purely derivative interest in the outcome of the litigation, an interest that in our view does not satisfy the requirements of Article III.

a. The injury alleged in *Snake River* is particularly speculative. The district court acknowledged that "the sellers of processing and refining facilities would be the direct beneficiaries of the capital gains tax deferral." App., *infra*, 17a. The court nevertheless deemed it "likely" that the processors' ability to defer the taxes "would benefit [appellees] in a concrete way," *ibid.*, by increasing appellees' chances of purchasing such facilities on favorable terms. See *id.* at 17a-18a ("the fact that the seller would be able to defer the taxes would, at the very least, likely give [respondents] some room to negotiate in terms of price"). This Court has been especially reluctant, however, to conclude that a plaintiff has a judicially cognizable interest in the potential tax liability of another private party. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Allen* v. *Wright*, *supra*. Appellees' purported injury is too speculative to satisfy the standing requirements of Article III.[6]

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[6] The district court's reliance (see App., *infra*, 16a) on *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), is

b. *City of New York* presents a more difficult jurisdictional question. The State of New York, whose entitlement to Medicaid reimbursement is most directly affected by the canceled budgetary authority, has not filed suit to challenge the cancellation. Even if the pending waiver applications submitted to HCFA by the State are ultimately denied, nothing in federal law would compel the State to recoup the lost Medicaid funds from appellees. Any injury appellees may ultimately suffer would depend upon the decision of state officials to seek recoupment under New York law. It is therefore unclear whether such injury would be "fairly traceable," *Bennett* v. *Spear*, 117 S. Ct. 1154, 1161 (1997), to the President's cancellation.[7] The pendency of the State's waiver

misplaced. The plaintiff in *Northeastern Florida* asserted that its members had been denied the opportunity to bid on certain government contracts on the basis of race, in violation of the Equal Protection Clause. See *id.* at 658-659. The Court held that the plaintiffs could establish standing without alleging that they would have obtained particular contracts if the challenged discrimination had not occurred. See *id.* at 666 ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). Appellees, by contrast, have not asserted an equal protection claim. Nor do they contend that the challenged cancellation has directly imposed any burden upon them. Their challenge is instead directed at the purportedly unlawful denial of favorable tax treatment to other private parties.

[7] In some instances this Court has recognized that a plaintiff may satisfy the causation requirement of Article III by demonstrating that private parties are likely to respond to federal action in a manner that will injure the plaintiff. See *e.g.*, *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-690 (1973); *Duke Power Co.* v. *Carolina Environmental Study Group Inc.*, 438

applications introduces a further element of uncertainty, since the State itself will suffer a loss of federal funds as a result of the challenged cancellation only if and when those applications are ultimately denied. For the time being, the State—and through it the hospital appellees—are receiving all reimbursements claimed, without regard to the disputed taxes. Although we regard the jurisdictional issue in this case as much closer than in *Snake River*, we believe that, on balance, the causal nexus between the President's cancellation and any injury appellees now claim to suffer does not satisfy the requirements of Article III.

2. The district court also erred in holding the Line Item Veto Act to be unconstitutional. The Act vests the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has appropriated will in fact be spent. That grant of authority is fully consistent with historical practice. From the beginning of the Republic, Congress has frequently conferred upon the President substantial discretion over the expenditure of appropriated funds. See pp. 3-7, *supra*. The settled historical practices of Congress and the Executive Branch regarding spending discretion strongly support the political Branches' shared judgment that the Act is constitutional.

U.S. 59, 74-78 (1978). It is unclear, however, whether a plaintiff can establish standing when the postulated causal chain depends upon discretionary action by a sovereign State, compare *Warth* v. *Seldin*, 422 U.S. 490, 509 (1975)—particularly when the State itself is more directly affected by the federal action but has declined to file suit.

The district court concluded that the Line Item Veto Act allows the President to usurp the legislative power by fashioning laws "different from those consented to by both Houses of Congress." App., *infra*, 24a. That conclusion is erroneous. Congress retains the power "to exempt a given appropriations bill (or a given provision in an appropriations bill) from the" President's cancellation authority under the Act. *Raines* v. *Byrd*, 117 S. Ct. 2312, 2320 (1997). Because Congress is presumed to legislate with an awareness of existing law, see, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), a tax or spending bill that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to spend, or to cancel, each item covered by the Act. Thus, the President's exercise of his cancellation authority does not produce laws "different from those consented to by both Houses of Congress," App., *infra*, 24a, since the possibility that individual items will be cancelled is implicit in the tax or spending law at the time it is passed. The President's cancellation of a tax or spending item subject to the Act is therefore a valid exercise of his power to execute the laws, not a repeal or amendment of a congressional enactment.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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FEBRUARY 1998

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

CITY OF NEW YORK, ET AL., PLAINTIFF

v.

WILLIAM J. CLINTON, ET AL., DEFENDANT

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS, INC., ET AL.
PLAINTIFF

v.

ROBERT E. RUBIN, ET AL., DEFENDANT

[Feb. 12, 1998]

MEMORANDUM OPINION

This case requires the Court to adjudge the constitutionality of the Line Item Veto Act. Before reaching the constitutional challenge, however, the Court must first conclude that it has jurisdiction to hear the case, by determining that Plaintiffs in this action have Article III standing. Based on the briefs and exhibits submitted by the parties and *amici curiae*[1], and argument at a hearing conducted on

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[1] *Amici curiae* briefs were submitted by Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin, in support of Plaintiffs' motions to declare the Line Item Veto Act uncon-

January 14, 1998, the Court finds that these Plaintiffs have demonstrated the requisite injury to have standing; furthermore, it finds that the Line Item Veto violates the procedural requirements ordained in Article I of the United States Constitution and impermissibly upset the balance of powers so carefully prescribed by its Framers. The Line Item Veto Act therefore is unconstitutional.

I. Background

A. The Line Item Veto Act[2]

Unable to control its voracious appetite for "pork," Congress passed, and the President signed into law, the Line Item Veto Act. Pub. L. No. 104-130, 110 Stat. 1200 (1996).[3] The Act is designed as an amendment to, and an enhancement of, Title X of the Congressional Budget and Impoundment Control Act of 1974 ("ICA"). 2 U.S.C. §§ 681 *et seq.* The ICA authorized the President to defer spending of Congressional appropriations during the course of a fiscal year or

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stitutional; the United States Senate, in support of the constitutionality of the Act; and Congressman Dan Burton, in support of the constitutionality of the Act.

[2] The Constitutionality of the Line Item Veto Act was litigated in this court a mere six months before the complaints in this case were filed. *See Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997). In *Byrd*, Judge Jackson declared the Act unconstitutional. *Id.* On a direct appeal of that District Court decision, the Supreme Court held that appellees, six members of Congress, lacked standing to bring the suit, and therefore vacated the District Court opinion and directed that the complaint be dismissed. *See Raines* v. *Byrd*, 117 S.Ct. 2312, 2323 (1997).

[3] President Clinton signed the Line Item Veto Act into law on April 9, 1996, it became effective January 1, 1997, and it remains effective until January 1, 2005.

other period of availability, as long as Congress intended for those appropriations to be permissive rather than mandatory. *Id.* The President also could propose the total rescission of an appropriation to Congress, but unless Congress approved the rescission, the President was obligated to release the funds. *Id* §§ 683(b), 688. Because it generally failed to make the rescissions recommended by the President, Congress found this arrangement to be an unsatisfactory mechanism for controlling deficit spending.[4]

As large deficits persisted, Congress considered various amendments to the ICA to alleviate its perceived defects. One proposal, called "expedited rescission," would amend the ICA to streamline the process for Congressional approval of rescissions proposed by the President. *See, e.g.*, H.R. 2164, 102d Cong. (1991). Other proposals included amending the Constitution to give the President a line item veto, *see, e.g.*, H.R.J. Res. 6, 104th Cong. (1995); H.R.J. Res. 4, 103d Cong. (1993), or adopting a congressional procedure for presenting each spending provision to the President as a separate bill, for approval or veto. *See, e.g.*, S. 137, 104th Cong. (1995); S. 238, 104th Cong. (1995). Congress settled on an "enhanced rescission" proposal, codified in the Line Item Veto Act, that makes Executive rescissions automatic in defined circumstances, subject to congressional disapproval. By making appropriations "conditional" during the period in which the President has authority to veto provisions, and "by placing the onus on Congress to overturn the President's cancellation of spending and

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[4] Since 1974, Presidents have recommended $72.8 billion in rescissions, but Congress has passed legislation rescinding only $22.9 billion. S. Rep. No. 104-13, at 2 (1995).

limited tax benefits," H.R. Conf. Rep. No. 104-491, at 16 (1996), the Line Item Veto Act reverses the appropriation presumptions under the ICA.

The Line Item Veto gives the President the authority to "cancel in whole," at any time within five days (excluding Sundays) after signing a bill into law, (1) "any dollar amount of discretionary budget authority," (2) "any item of new direct spending;" and (3) "any limited tax benefit." 2 U.S.C. § 691a (1997).

A "dollar amount of discretionary budget authority" is defined as "the entire dollar amount of budget authority" that is specified in the text of an appropriations law or found in the tables, charts, or explanatory text of statements or committee reports accompanying a bill. *Id.* at § 691e(7). An "item of new direct spending" is a specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other specified programs. *Id.* at §§ 691e(8), 691e(5). A "limited tax benefit" is a revenue-losing provision that gives tax relief to 100 or fewer beneficiaries in any fiscal year, or a tax provision that "provides temporary or permanent transitional relief for ten or fewer beneficiaries in any fiscal year."[5] *Id.* at § 691e(9).

With respect to any dollar amount of discretionary budget authority, the Act defines "cancel" as "to rescind." *Id.* at § 691e(4)(A). Cancellation of an item of new direct spending or a limited tax benefit prevents it from having "legal force or effect." *Id.* at § 691e(4)(B). Canceled funds may not be used for any

[5] The Joint Congressional Committee on Taxation is responsible for identifying cancelable items in tax bills. *Id.* at § 691f.

purpose other than deficit reduction. *Id.* at §§ 691c(a)-(b).

To exercise cancellation authority, the President must submit a "special message" to Congress within five calendar days of signing a bill containing the item being canceled. *Id.* at § 691a(c)(1). The President's special message must set forth the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; an estimate of "the . . . effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided;" and the geographic distribution of the canceled spending. *Id.* at § 691a(b). The President may exercise this authority only after determining that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions, and (iii) not harm the national interest." *Id.* at § 691(a)(A).

A cancellation takes effect upon Congress' receipt of the President's special message. *Id.* at § 691b(a). Congress can restore a canceled item by passing a "disapproval bill," which is not subject to the President's Line Item Veto authority, but is subject to the veto provisions detailed in Article I. *Id.* Disapproval bills must comport with the requirements prescribed in Article I, section 7, although the Line Item Veto Act provides for expedited consideration of these bills. *Id.* at §§ 691e(6)-692(c). If a disapproval bill is enacted into law, the President's cancellation is nullified and the canceled items become effective. *Id.* at § 691b(a).

In terms of judicial review, the Line Item Veto Act provides that "[a]ny member of Congress or any individual adversely affected . . . may bring an action in the United States District Court for the District of

Columbia, for declaratory judgment and injunctive relief on the ground that any provision of [the Act] violates the Constitution." *Id.* at § 692(a)(1). The Act provides for direct appeal to the Supreme Court and directs both Courts "to expedite to the greatest possible extent the disposition of any matter brought under [this provision.]" *Id.* at 692(b)-(c)_.

B. Factual Background in *New York v. Clinton*

The City of New York plaintiffs consist of the City itself, two hospital associations (Greater New York Hospital Association, or GNYHA, and New York City Health and Hospitals Corporation, or NYCHHC), one hospital (the Jamaica Hospital Medical Center), and two unions that represent health care employees (District Council 37, American Federation of State, County and Municipal Employees and Local 1199, National Health and Human Service Employees).

The City of New York plaintiffs' claims arise out of a dispute over Federal Medicaid payments to the State of New York. The Health Care Financing Administration of the Department of Health and Human Services ("HCFA") provides federal financial participation ("FFP") to match certain state Medicaid expenditures. (*See* Brown Decl., Defs' Ex. 1 at ¶3.) The FFP provided by the federal Medicaid program to match state expenditures is reduced by the revenue that the state receives from health care related taxes. *Id.* at ¶4. The FFP is not reduced, however, by tax revenue that meets specified criteria, including that the taxes are "broad-based" (*i.e.*, applied to all health care providers within the same class) and "uniform" (*i.e.*, applied equally to all taxed providers). *Id.*

New York State taxes its health care providers and uses this tax revenue to pay for health care for the poor. (*See* Wang Decl., Pls.' Ex. 2 at ¶4.) The State exempts certain revenues (*e.g.*, those derived from particular charities) of some health care providers (*e.g.*, the plaintiff health care providers) from the health care provider tax. (*See* van Leer Decl., Pls' Ex. 3 at ¶3.) That is, New York exempts plaintiff health care providers from taxes that other health care providers must pay.

On December 19, 1994, HCFA notified New York State that 19 of its tax programs violated HCFA's requirements. (*See* Dear State Medicaid Director Letter, Pls.' Ex. 2D.) Since then, New York has submitted over 60 waiver applications to HCFA, which to date have neither been approved nor denied. (*See* Wang Decl., at ¶7.) A finding by HCFA that a State's taxes are impermissible effects a disallowance of the State's Medicaid expenditures and allows HCFA to recoup the matching funds that it has already paid to the State. *Id.* at ¶6. If HCFA denies a waiver request, the State may appeal the denial to the Departmental Appeals Board. (*See* Brown Decl. at ¶6.)

If HCFA ultimately deems New York's taxes impermissible, New York State law provides that those health care providers that were previously excluded from the taxes must pay them retroactively. (*See* Wang Decl. at ¶8.) For example, NYCHHC's tax liability is estimated to be more than $4 million for each year at issue. In total, $2.6 billion may be subject to recoupment from New York State. *Id.* at ¶¶7-8.

The Balanced Budget Act of 1997, Pub. L. No. 105-33, included a provision, section 4722(c), that would have alleviated this exposure to liability. It established that New York State expenditures derived from certain health care provider taxes qualified for FFP under the Medicaid program. *Id.* at ¶9. This section signified that New York State would not have to return the funds in question to HCFA; for Plaintiffs, it meant that they were relieved of their liability to New York State should HCFA deny New York's waiver requests.

The President signed the Balanced Budget Act into law on August 5, 1997. Six days later, he identified section 4722(c) as an item of new direct spending and canceled it, thus reinstating Plaintiffs' exposure to liability. Cancellation No. 97-3, 62 Fed. Reg. 43,263 (1997). The President adopted the Congressional Budget Office's estimate that the cancellation of section 4722(c) would reduce the federal deficit by $200 million in FY 1998. *Id.*

C. Factual Background in *Snake River Potato Growers, Inc. v. Rubin*

Snake River Potato Growers, Inc. is, according to Plaintiffs, an "eligible farmers' cooperative" within the meaning of section 968 of the Taxpayer Relief Act. (*See* Cranney Decl., Pls' Ex. 2 at ¶9.) Its membership consists of approximately 30 potato growers located throughout Idaho, who each owns shares of the cooperative. Plaintiff Mike Cranney, a potato grower with farms located in Idaho, is a member, Director and Vice Chairman of the cooperative. *Id.* at ¶2. Snake River was formed in May 1997 to assist Idaho potato growers in marketing their crops and stabilizing prices, in part though a strategy of acquiring potato processing facilities. *Id.* at ¶9 These facilities allow individual growers to aggregate their crops and process and deliver them to market jointly. Furthermore, they allow members to retain revenues formerly paid out to third-party processors. *Id.* at ¶13.

On August 5, 1997, the President signed into law the Taxpayer Relief Act, Pub. L. No. 105-34, 111 Stat. 788 ("TRA"). Section 968 of the TRA amended the Internal Revenue Code to allow the owner of the stock of a qualified agricultural refiner or processor to defer recognition of capital gains on the sale of such stock to an eligible farmers' cooperative. That is, it would have allowed a processor to sell its facilities to an eligible cooperative without paying tax currently on any capital gain. The stated purpose of section 968 was to aid farmers' cooperatives in the purchase of processing and refining facilities.[6] (*See* Dear Colleague Letter by Reps. Roberts and Stenholm of 12/1/95, Pls.' Ex. 5.) On August 11, 1997, the President identified this provision as a "limited tax benefit," within the meaning of the Line Item Veto Act, and canceled it. Cancellation No. 97-2, 62 Fed. Reg. 43,267 (1997). In his cancellation message, the President estimated that sellers could have used section 968 to defer paying $98 million in taxes over the next five years, and $155 million over the next ten. *Id.*

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[6] Before the passage of section 968, farmers' cooperatives were at a competitive disadvantage vis a vis investor-owned business. Co-ops could not exchange their stock for the stock of processing companies, because a cooperative' stock can be held only by its members. (*See* Cranney Decl. at ¶ 5.)

Snake River had actively pursued at least one transaction that could have taken advantage of section 968. In May 1997, when Congress initially was considering the proposals in section 968, Mike Cranney and another officer of Snake River discussed with Howard Phillips, a principal owner of Idaho Potato Packers ("IPP"), the purchase by Snake River of the stock of a company that owned an IPP potato processing facility in Blackfoot, Idaho. (*See* Cranney Decl. at ¶19.) Plaintiffs contend that this company would have been a "qualified processor" under section 968 and that a deal with Phillips could have been structured so as to comply with all requirements of section 968. *Id.* at ¶¶21-23. Plaintiffs maintain that Phillips was interested in pursuing the sale because he could defer taxes on his gain if section 968 passed. *Id.* at ¶23. The negotiations did not continue after the President canceled section 968. *Id.* at ¶24.

II. Justiciability

Before tackling the merits of this case, the Court must first determine whether it has jurisdiction to hear it. Under Article III, section 2 of the Constitution, the federal courts have jurisdiction over a dispute only if it is a "case" or "controversy." *See Raines v. Byrd*, 117 S.Ct. 2312 (1997). The Supreme Court has regarded the case or controversy prerequisite as a "bedrock requirement" and has observed that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id. citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

The central jurisdictional requirement that controls the analysis of these consolidated cases is the doctrine of standing. The Supreme Court has emphasized that the standing inquiry is "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 117 S.Ct. at 2317-18. It has cautioned,

> "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency.

It is with these admonitions soundly in mind that this Court proceeds with its standing analysis regarding the plaintiffs now before it.

A. Standing

While the Supreme Court has candidly acknowledged that "the concept of 'Article III Standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it,"[7] *Valley Forge Christian College*, 454 U.S. at 475, certain basic principles have been distilled from the Court's decisions:

> To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has

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[7] *But see* Ralph Waldo Emerson, *Essays: Self-Reliance* (1841), "A foolish consistency is the hobgoblin of little minds."

suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," as opposed to merely "abstract," and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." Further, the litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.

Whitmore v. Arkansas, 495U.S. 149 (1990) (internal citations omitted). Here, the principal standing inquiry is whether Plaintiffs can demonstrate sufficient injury, "actual or threatened." *See Valley Forge Christian College*, 454 U.S. at 472.

Although these plaintiffs do not neatly fit into any category of plaintiffs that the Supreme Court has already found to have standing, this Court finds that they meet the Article III requirements. The President directly injured both the City of New York plaintiffs and the Snake River plaintiffs when he canceled legislation that provided a benefit to them.

1. City of New York Plaintiffs[8]

Plaintiffs suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of that law. The Court thus finds that Plaintiffs have suffered sufficient injury to have Article III standing.

When the President signed the Balanced Budget Act of 1977, section 4722(c) became law. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). Consequently, every New York State tax program held not to meet HCFA's requirements was deemed permissible by federal legislation. The State's liability was eliminated and the hospitals upon which that liability would fall were exonerated of their burden. Plaintiffs possessed a valuable protection against any liability that otherwise might befall them. This protection constituted a benefit to Plaintiffs. When the President canceled section 4722(c), Plaintiffs were divested of the benefit conferred upon them by the legislation. In the simplest terms, Plaintiffs had a benefit, and the President took that benefit away. That is injury.

Defendants argue that, because there are still administrative options available to Plaintiffs, Plaintiffs were not injured by the President's cancellation of this legislative solution. The Court disagrees. Plaintiffs had two independent avenues that they could

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[8] The Court's standing analysis focuses on the plaintiff health care providers. As long as the Court determines that at least one of the New York plaintiffs has standing, it does not need to consider the standing issue as to the other plaintiffs in that action. *See Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986).

have pursued to avoid potential liability: one legislative and one administrative. The legislative approach yielded complete success. The fact that there are two mechanisms that could produce a result does not mean that a party is not injured when one of those mechanisms produces the desired result, and then that result is obliterated. Analogously, if Plaintiffs were pursuing a challenge to a final agency action, the fact that there might also be pending legislation would not deprive them of standing to challenge the final agency action. *See INS v. Chadha*, 462 U.S. 919, 936-37 (1938) (Burger, C.J.) (finding that the existence of other speculative avenues of relief does not constitute a prudential bar to the Court's consideration of a case). The Court finds that the availability of administrative relief does not eliminate Plaintiffs injury in the legislative arena.

Plaintiffs also have shown with reasonable certainty that they will be liable for millions of dollars now that Section 4722(c) has been canceled. Under the current law, it is highly likely that the State of New York will be required to return to HCFA at least some of the funds that HCFA paid to the State. First of all, HCFA has already deemed the taxes impermissible. HHS has stated that in the absence of legislation (like Section 4277(c)), by August 1998, "the Secretary will move forward to complete the process already begun to apply with full force the current law." (Dear State Medicaid Directors Letter, Pls.' Ex. 2D.) Next, to exercise Line Item Veto authority, the President was required to certify that the veto *would* reduce the federal deficit; he complied with that requirement by certifying that cancellation of Section 4277(c) *would* result in a reduction in federal

outlays in FY 1998 of $200 million. Cancellation No. 97-3, 62 Fed. Reg. 43,263 (1997). Finally, at a press briefing on the cancellation, Office of Management and Budget Director Franklin Raines described Section 4722(c) as "a provision that provided special relief to the State of New York for provider taxes that *had been determined by HCFA to be illegal* under a 1991 statute." (Pls.' Ex 2C (emphasis added).) Raines added that "New York will not be able" to use the taxes to increase its FFP. *Id.* Thus, this Court concludes that it is more likely than not that the State of New York will be required to refund at least some of the payments it has received from HCFA.

Likewise, the Court finds that Plaintiffs are highly likely to be required to indemnify the State for its HCFA recoupments. Defendants do not dispute that New York law imposes automatic liabilities upon hospitals and nursing homes upon a finding that New York's provider taxes are not permissible. (*See* Wang Decl., Pls.' Ex. 2 at ¶8.) Plaintiffs would avoid liability only in the unlikely event that the State of New York would rescind these laws or decline to enforce them. Again, the Court finds that this scenario is less likely than one in which Plaintiffs are required to indemnify the State.

Therefore, by finding that the City of New York plaintiffs have demonstrated sufficient injury, the Court concludes that they have standing to challenge the constitutionality of the Line Item Veto Act.

2. Snake River Plaintiffs

Like the City of New York plaintiffs, the Snake River plaintiffs suffered an immediate, concrete injury when the President canceled section 968. Sec-

tion 968 conferred a benefit on Plaintiffs by putting them on equal footing with investor-owned businesses. Before section 968 was passed, investor-owned businesses could structure acquisitions of processing facilities as tax-deferred stock-for-stock exchanges. Farmers' cooperatives could not exchange their stock because a cooperative's stock can be held only by its members. Section 968 would have allowed sellers to defer capital gains taxes on sales to farmers' co-ops, thus putting co-ops in the same competitive position as investor-owned businesses.[9]

The Supreme Court has held that the inability to compete on an equal basis in the bidding process in injury in fact. *See Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). In that case, the Court found that contractors that regularly bid on, and performed, construction work for the City of Jacksonville, and would have bid on designated set-aside contracts but for the restrictions imposed, had standing, even though they failed to allege that they would have been awarded a contract but for the challenged ordinance. Here, regardless of whether Plaintiffs can prove that they would have actually consummated purchases under section 968, they are

[9] As a simplified example, if an investor-owned business and a farmers' co-op each offered $1 million for a processing plant, the investor-owned business would always prevail because the processor would actually net $1 million from that sale, whereas it would net less than $1 million from the sale to the farmers' co-op, because it would have to pay capital gains tax on that sale. Therefore, to compete for a piece of property with an investor-owned business, the farmers co-op would have to offer more than the investor-owned business to make up for the capital gains tax that the purchaser would have to pay.

injured by the fact that section 968 put them on equal footing with their competitors and its cancellation disabled them from competing on an equal basis. When the President canceled section 968, Plaintiffs were divested of the benefit conferred upon them by the legislation and therefore were concretely injured.

In addition, it is highly likely that the Snake River plaintiffs would have been able to take advantage of the benefits conferred by section 968 and that they therefore will be injured by the President's cancellation of it. Snake River Potato Growers, Inc. was formed for the purpose of acquiring potato processing facilities. Although the sellers of processing and refining facilities would be the direct beneficiaries of the capital gains tax deferral, it is likely that the fact that the processors would be able to defer these taxes would benefit Plaintiffs in a concrete way.[10] For example, in a deal in which there are no other prospective purchasers, even if a seller chose to completely absorb the monetary benefits of the capital gains tax deferral, the fact that the seller would be able to defer the taxes would, at the very least, likely give Plaintiffs some room to negotiate in terms of

[10] Defendants argue that because Plaintiffs themselves would not have received the capital gains tax deferral, they are not the beneficiaries of section 968. The Court disagrees. The express purpose of section 968 was to help farmers to buy refining and processing facilities by eliminating a tax obstacle facing sellers who sell to them. Thus, although the direct recipient of the tax deferral was the sellers, it was plainly understood that the intention was to benefit the farmers; a cancellation of the tax deferral would really injure the farmers, not the owners of the processing plants, because the owners could already get the tax deferral simply by selling to investor-owned businesses.

price; in a competitive situation, it would allow Plaintiffs to pay a lower purchase price than they would have in a scenario in which they were not on equal footing with the other would-be purchasers.[11]

While Plaintiffs cannot demonstrate with certainty that they would be able to take advantage of the benefits provided by section 968, such certainty is not required. In *Bryant v. Yellen*, 447 U.S. 352 (1980), for example, farm workers wishing to purchase land had standing even though they could not with certainty establish that they would be able to purchase it. In that case, a reclamation law forbid delivery of reclamation project water to any irrigable land held in private ownership by one owner in excess of 160 acres. If this law were enforced, owners of land in excess of 160 acres would probably sell their acreage and would probably be forced to sell at below current market prices. The Court reasoned that farm workers who desired to purchase farmlands in the area had standing, because it was "unlikely" that the owners of excess lands would sell at below-market prices without the law, and it was "likely" that excess lands would become available at less than market prices if the law were applied.

Likewise, the Snake River plaintiffs need only show that the existence of section 968 would have made it more likely that they could acquire processing and refining facilities. As illustrated above, by putting Plaintiffs on equal footing with other bidders, it is likely that Plaintiffs would be able to make a

[11] For example, in the illustration provided in footnote 9, *supra*, instead of having to offer, say, $1.3 million to compete with the investor-owned business, the co-op could offer an amount in the $1 million range.

purchase by offering less than they would have without the benefit of section 968. Also, the tax deferral would, at the very least, give Plaintiffs more room to negotiate in terms of price. Thus, section 968 would have helped the Snake River plaintiffs in their efforts to purchase processing and refining facilities.

Defendants argue that Plaintiffs cannot meet the redressability requirement of the standing doctrine. They cite *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), and *Allen v. Wright*, 468 U.S. 737 (1984), to support their contention that there is no way for the Court to know whether any sellers would be motivated by the benefits of section 968 to sell to Plaintiffs. This case is distinguishable from *Simon* and *Allen*, however, because here, Plaintiffs have sufficiently demonstrated that if this Court struck the Line Item Veto Act and reinstated section 968, they would be more likely to be able to competitively bid on, and prevail in purchasing, processing and refining facilities.

In *Simon*, the Supreme Court determined that low-income plaintiffs lacked standing to challenge a tax regulation establishing the amount of free medical care that a charitable hospital must provide to maintain its tax-exempt status. The Supreme Court explained that it was "purely speculative" to assume that the challenged regulation cause charitable hospitals to provide less service than they would otherwise provide free of charge, and it was "equally speculative" to assume that increasing the amount of free services required for tax exemption would in fact increase the amount of free service provided. *Simon*, 426 U.S. at 42-43. The Court commented that the hospitals might elect to forgo favorable tax treatment

to avoid the financial drain of providing more free treatment.

In *Allen*, the Supreme Court concluded that parents of public school children lacked standing to challenge the legality of a tax exemption that benefitted racially discriminatory private schools. The plaintiffs claimed that the tax exemption made it easier for white children to enroll in private schools, the result being that the public schools were less diverse, to the plaintiffs' detriment. The Supreme Court indicated that it would be "entirely speculative" to conclude that withdrawal of the tax exemption would lead any private school to change its exclusionary policies. *Allen*, 468 U.S. at 758.

In both of these cases, there was arguably some disincentive to the institutions' taking advantage of the tax benefit. The hospitals in *Simon* would have to admit more non-paying patients; the schools in *Allen* would have to admit a more diverse student body, against their wishes. In these cases, it may indeed have been speculative to attempt to determine whether the hospitals and schools would be willing to make these changes in order to take advantage of the tax incentive. Here, Defendants do not allege that there is any "cost" to the selling processors and refiners in taking advantage of the tax benefits that section 968 would offer. Unlike the schools and hospitals in *Allen* and *Simon*, the sellers' decision likely would be a purely financial one.

Defendants also contend that Plaintiffs submissions regarding Mike Cranney's planned purchase of the IPP processing facility are barren of facts that would demonstrate whether section 968 would have had any impact on that transaction, because of the

specific requirements of section 968.[12] While the Court will not speculate as to whether Carnney's deal with Phillips would have been brought to fruition but for the President's cancellation of section 968, or even if that particular deal would have satisfied the requirements of section 968, the negotiations at the very least make it clear to the Court that Plaintiffs were actively spending their time and money pursing purchases and that the President's cancellation of section 968 interfered with those plans. *Compare Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991) (holding that plaintiffs lacked standing to challenge an environmental regulation because, although plaintiffs had a desire to return to the habitat of certain endangered species, they failed to present any concrete plans of an actual visit).

The Court finds that the Snake River plaintiffs suffered an injury when the President canceled Section 968. Plaintiffs lost the benefit of being on equal footing with their competitors and will likely have to pay more to purchase processing facilities now that the sellers will not being able to take advantage of section 968's tax breaks. The Court therefore concludes that the Snake River plaintiffs have demonstrated sufficient injury to have Article III standing.

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[12] To qualify for a deferral of capital gains taxes under section 968(g), the seller must transfer 100% of the stock of the qualified processor to the farmers' cooperative. Section 968(a) requires that, during the one-year period preceding the date of sale, the qualified refiner or processor purchase at least 50% of the products to be refined or processed from the farmers who make up the eligible farmers' cooperative that is purchasing the corporations' stock or from the cooperative itself.

III. Constitutional Analysis of the Line Item Veto

Having determined that it has jurisdiction to hear this case, the Court now turns to the merits of Plaintiffs' constitutional challenges. The Court begins with the presumption that the Line Item Veto Act is valid. *See, e.g., INS v. Chadha*, 426 U.S. 919, 944 (1983). The *Chadha* Court cautioned, however,

> The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . .

Id.

The Court's constitutional analysis is two-fold. First, the Court examines the Line Item Veto Act in terms of the procedural requirements set forth in Article I, section 7; next, the Court discusses the doctrine of separation of powers. The Court concludes that the Line Item Veto Act fails both of these examinations.

A. Procedural Requirements of Article I

The Constitution carefully prescribes certain formal procedures that must be observed in the enactment of laws. The Line Item Veto Act impermissibly attempts to alter these constitutional requirements through mere legislative action.[13] Because the Act

[13] This approach has been cautioned against since the founding of our democracy. "If in the opinion of the People, the distribution or modification of the Constitution powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." George Washington, Farewell Address, September 19, 1796 *in* 35 *The Writings of George Washington* 229 (John C. Fitzpatrick ed., 1940).

violates Article I's "single, finely wrought and exhaustively considered, procedure," *Chadha*, 462 U.S. at 951, it is unconstitutional.

Article I, section 7 of the Constitution sets forth dual requirements for the enactment of statutes: bicameral passage and presentment to the President. *See* U.S. Const. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it . . .") (the Bicameralism and Presentment Clauses would serve essential constitutional functions. "By providing that no law could take effect without the concurrence of the prescribed majority of the Member os both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." *Chadha*, 462 U.S. at 948-49. At the heart of the notion of bicameralism is the requirement that any bill must be passed by both Houses of Congress in exactly the same form.

The Constitution requires that both the amendments and repeal of statutes also conform with these Article I requirements. *Chadha*, 462 U.S. at 954. It makes only four narrow exceptions to this single mechanism by which the provisions of law may be canceled. *See* U.S. Const. art. I, § 2, cl. 6; art. I, § 3, cl.

5; art. II, § 2, cl. 2. Congress may not add to this exclusive list without amending the Constitution. In the words of the *Chadha* court,

> The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted [here] requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.

Chadha, 462 U.S. at 957-58.

Here, while the initial passage of the Balanced Budget Act and the Taxpayer Relief Act complied with the Article I requirements, the Line Item Veto Act then authorized the President to violate those requirements by producing laws that had not adhered to those requirements. Both Houses of Congress, through a process of discussion and compromise, had agreed upon the exact content of the Balanced Budget Act and the Taxpayer Relief Act. These laws reflected the best judgment of both Houses. The laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress. There is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and the Senate. Because the laws that

emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, as required, the resulting laws are not valid.

Furthermore, the President violated the requirements of Article I when he unilaterally canceled provisions of duly enacted statutes. Unilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses were designed to prevent. Once a bill becomes law, it can only be repealed or amended through another, independent legislative enactment, which itself must conform with the requirements of Article I. Any rescissions must be agreed upon by a majority of both House of Congress. The President cannot single-handedly revise the work of the other two participants in the lawmaking process, as he did here when he vetoed certain provisions of these statutes.

Defendants, curiously content that, despite its title, the Line Item Veto Act does not authorize the President to "veto" anything. They maintain that under the Act, "[t]he Bill stays as law, unless the President were to exercise his constitutional power to veto. Nothing changes about the bill. The law remain law. . . The law remains on the books and the law remains valid." (Tr. of Mot. Hr'g, Jan. 14, 1998 at 71, 78.) The Court does not follow Defendants' logic. In the words of Richard Cardinal Cushing, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." Whatever defendants wish to call the President's action, it has every mark of a veto. The Line Item Veto Act states explicitly that "cancel" means "to rescind" or to render the provision as having no "legal force or effect." How a "canceled" provision

"remains on the books" and "remains valid" defies logic. The only way to restore these canceled provisions is for Congress to pass and present new bills according to the procedure prescribed in Article I. Clearly, this is an indication that the canceled law no longer exists. Therefore, despite Defendants' contentions, the Court finds that when the President canceled these provisions pursuant to his Line Item Veto authority, he unilaterally repealed duly enacted provisions and amended duly enacted laws, which Article I does not permit him to do.

Finally, Congress' "indirect attempt[] to accomplish what the Constitution prohibits . . . accomplishing directly" cannot stand. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995). "To argue otherwise is to suggest that the Farmers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Id.* at 831. Congress knew that a simple Line Item Veto, performed prior to the President's signature, would violate the Article I's requirement that the president sign or return the bills *in toto*. *See Line Item Veto: The President's Constitutional Authority, Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 103d Cong. (1994). This limitation on the President has been clear since George Washington's tenure. *See* 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940) ("From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto.") Congress cannot evade this long-accepted requirement by merely changing the timing of the President's cancellation.

Because the Line Item Veto Act produced laws in violation of the requirement of bicameral passage, because it permitted the President unilaterally to repeal or amend duly enacted laws, and because it impermissibly attempts to evade the requirements that the President sign or reject a bill *in toto*, the Act violates the requirements of Article I. For that reason alone, the Line Item Veto Act is unconstitutional.

B. Separation of Powers

Furthermore, the Line Item Veto Act is unconstitutional because it impermissibly disrupts the balance of powers among the three branches of government.[14] The separation of powers into three coordinate branches is central to the principles on which this country was founded. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 380 (1989). The declared purpose of separating and dividing the powers of government was to "diffuse power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). In writing about the principle of separated powers, Madison stated, "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist No. 47*, at 324 (J. Cooke ed. 1961). Madison later wrote, "But the great

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[14] While this analysis focuses on the balance of powers between the legislative and executive branches, the Line Item Veto could also affect judicial independence. It is possible that the President might use the Line Item Veto to manipulate the judiciary's budget, thus exerting pressure on its members. *See* Robert Destro, *Whom Do You Trust? Judicial Independence, the Power of the Purse & the Line Item Veto*, 44-Jan. Fed. Law. 26, 29 (1977).

security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." *The Federalist No. 51*, at 349 (J. Cooke ed. 1961). The Framers "regarded the checks and balances that they built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. at 122.

Pursuant to the doctrine of separate powers, certain functions are divided between the legislative and executive branches. Article I, section I vests all legislative authority in Congress. Legislative power is the authority to make laws. *Myers v. United States*, 272 U.S. 52 (1926). Executive powers, on the other hand, is to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. With regard to lawmaking, the President's function is strictly a negative one: to veto a bill in its entirety.

While it is Congress' duty to make laws, Congress can delegate certain rulemaking authority to other branches, as long as that delegation is appropriate to the duties of that branch. *See Mistretta*, 488 U.S. at 388. Congress may not, however, delegate its inherent lawmaking authority. *See, e.g., Loving v. United States*, 116 S.Ct. 1737, 1744 (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government

ordained by the Constitution."); Edward Gibbon, *History of the Decline and Fall of the Roman Empire* 33 (1838) ("The principles of a free constitution are irrecoverably lost, when the legislative power is nominated by the executive."); Sir William Blackstone, 1 *Commentaries on the Law of England*, 146 (9th ed., reprinted 1978) (1783) ("In all tyrannical governments the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.").

The line between permissible delegations of rulemaking authority and impermissible abandonments of lawmaking power is a thin one. As one court described the distinction, "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Field*, 143 U.S. at 694. Stated another way, "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Hampton v. United States*, 276 U.S. 394 (1928).

The Line Item Veto Act impermissibly crosses the line between acceptable delegations of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and package legislation. The Act enables the President, in his

discretion, to pick and choose among portions of an enacted law to determine which ones will remain valid. The Constitution, however, dictates that once a bill becomes law, the President's sole duty is to "take care that the laws be faithfully executed." His power cannot expand to that of "co-designer" of the law—that is Congress' domain. Any subsequent amendment of a statute falls under Congress' responsibility to legislate. The President cannot take this duty upon himself, nor can Congress relinquish that power to the Executive Branch.

The Defendants contend that the Line Item Veto is no different than the many delegations of legislative authority that Congress has made in the past. *See, e.g., Field v. Clark*, 143 U.S. 649. Unlike other delegations of Congressional authority, however, the Line Item Veto Act authorizes the President to permanently extinguish laws. These laws cannot be revived even if the President (or his successor) feels that they are needed. Further, the Line Item Veto Act empowers the President to make permanent changes to the text of the Internal Revenue Code, as he did in the Snake River case. Such delegations are unprecedented.

Defendants further urge the Court to find that the Line Item Veto provides the President with "intelligible standards" as required by the delegation doctrine. *See Mistretta*, 488 U.S. at 372. While it is true that the delegation doctrine has enjoyed a liberal reading in the last 60 years or so, *see, e.g., Federal Radio Comm'n v. Nelson Bros.*, 289 U.S. 266 (1933) (upholding a delegation based on "public convenience, interest or necessity"), by trying to bypass the maxim that Congress can delegate authority only if

that authority is, in fact, delegable, the Government attempts to "leap a chasm in two bounds." (Benjamin Disraeli, Earl of Beaconsfield.) It is irrelevant whether the Line Item Veto Act provides intelligible principles in its delegation of authority to the President because, as discussed above, the Act impermissibly attempts to transfer non-delegable legislative authority to the Executive Branch.

The separation of powers between the President and Congress is clear:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown, 343 U.S. at 587-88. By ceding inherently legislative authority to the President, the Line Item Veto Act violates this constitutional framework. For that reason, and for the reason that it violates the letter and spirit of the procedural requirements of Article I, the Line Item Veto Act is unconstitutional.

IV. Conclusion

Although the Line Item Veto Act may have presented an innovative and effective manner in which to control runaway spending by Congress, the Framers held loftier values. The *Chadha* Court recognized this tension between uncomplicated administration of government and the values honored in the Constitution:

> The choices we discern as having been made in the Constitutional convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Chadha, 462 U.S. at 959. Because the Line Item Veto impermissibly violates the central tenets of our system of government, it cannot stand.

Therefore, because the Court finds that Plaintiffs have demonstrated the requisite injury to have standing and, furthermore, that the Line Item Veto Act violates the provisions of Article I, section 7 of the United States Constitution and the separation of powers doctrine, this Court declares that the Line Item Veto Act is unconstitutional. Accordingly, the Court will grant Plaintiffs' Motions for Summary

Judgment and deny Defendants' Motion to Dismiss and Motion for Summary Judgment. An Order will accompany this Opinion.

February 12th, 1998

/s/ THOMAS F. HOGAN
THOMAS F. HOGAN
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

THE CITY OF NEW YORK,
ET. AL., PLAINTIFFS

v.

WILLIAM J. CLINTON,
ET. AL., DEFENDANTS

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS,
INC., ET. AL, PLAINTIFFS

v.

ROBERT E. RUBIN, DEFENDANT

[Filed Feb. 13, 1998]

NOTICE OF APPEAL

Pursuant to 2 U.S.C. § 692(b), William J. Clinton, President of the United States, Donna E. Shalala, Secretary of Health and Human Services, and Franklin D. Raines, Director, Office of Management and Budget, defendants in Civ. No. 97-2393 (TFH), and Robert E. Rubin, Secretary of the Treasury, defendant in Civ. No. 97-2463 (TFH), appeal to the United States Supreme Court from the Order issued by this Court on February 12, 1998.

Respectfully submitted,

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Dated: February 13, 1998

APPENDIX C

STATUTORY PROVISIONS

§ 691. Line item veto authority

(a) In general

Notwithstanding the provisions of subchapters I and II of this chapter, and subject to the provisions of this subchapter, the President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—

(1) any dollar amount of discretionary budget authority;

(2) any item of new direct spending; or

(3) any limited tax benefit;

if the President—

(A) determines that such cancellation will—

(i) reduce the Federal budget deficit;

(ii) not impair any essential Government functions; and

(iii) not harm the national interest; and

(B) notifies the Congress of such cancellation by transmitting a special message, in accordance with section 691a of this title, within five calendar days (excluding Sundays) after the enactment of the law providing the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit that was canceled.

(b) Identification of cancellations

In identifying dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits for cancellation, the President shall—

(1) consider the legislative history, construction, and purposes of the law which contains such dollar amounts, items, or benefits;

(2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information; and

(3) use the definitions contained in section 691e of this title in applying this subchapter to the specific provisions of such law.

(c) Exception for disapproval bills

The authority granted by subsection (a) of this section shall not apply to any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in any law that is a disapproval bill as defined in section 691e of this title.

§ 691a. Special messages

(a) In general

For each law from which a cancellation has been made under this subchapter, the President shall transmit a single special message to the Congress.

(b) Contents

(1) The special message shall specify—

(A) the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit which has been canceled, and provide a corresponding reference number for each cancellation;

(B) the determinations required under section 691(a) of this title, together with any supporting material;

(C) the reasons for the cancellation;

(D) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the cancellation;

(E) all facts, circumstances and considerations relating to or bearing upon the cancellation, and to the maximum extent practicable, the estimated effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided; and

(F) include the adjustments that will be made pursuant to section 691c of this title to the discretionary spending limits under section 665 of this title and an evaluation of the effects of those adjustments upon the sequestration procedures of section 901 of this title.

(2) In the case of a cancellation of any dollar amount of discretionary budget authority or item of new direct spending, the special message shall also include, if applicable—

(A) any account, department, or establishment of the Government for which such budget authority was to have been available for obligation

and the specific project or governmental functions involved;

(B) the specific States and congressional districts, if any, affected by the cancellation; and

(C) the total number of cancellations imposed during the current session of Congress on States and congressional districts identified in subparagraph (B).

(c) Transmission of special messages to House and Senate

(1) The President shall transmit to the Congress each special message under this subchapter within five calendar days (excluding Sundays) after enactment of the law to which the cancellation applies. Each special message shall be transmitted to the House of Representatives and the Senate on the same calendar day. Such special message shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session.

(2) Any special message transmitted under this subchapter shall be printed in the first issue of the Federal Register published after such transmittal.

§ 691b. Cancellation effective unless disapproved

(a) In general

The cancellation of any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit shall take effect upon receipt in the House of Representatives and the Senate of the special message notifying the Congress of the cancellation. If a disapproval bill for such special message is enacted into law, then all cancellations disapproved in

that law shall be null and void and any such dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit shall be effective as of the original date provided in the law to which the cancellation applied.

(b) Commensurate reductions in discretionary budget authority

Upon the cancellation of a dollar amount of discretionary budget authority under subsection (a) of this section, the total appropriation for each relevant account of which that dollar amount is a part shall be simultaneously reduced by the dollar amount of that cancellation.

§ 691c. Deficit reduction

(a) In general

(1) Discretionary budget authority

OMB shall, for each dollar amount of discretionary budget authority and for each item of new direct spending canceled from an appropriation law under section 691(a) of this title—

(A) reflect the reduction that results from such cancellation in the estimates required by section 251(a)(7) of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 901(a)(7)] in accordance with that Act [2 U.S.C. 900 et seq.], including an estimate of the reduction of the budget authority and the reduction in outlays flowing from such reduction of budget authority for each outyear; and

(B) include a reduction to the discretionary spending limits for budget authority and outlays in accordance with the Balanced Budget and

Emergency Deficit Control Act of 1985 [2 U.S.C. 900 et seq.] for each applicable fiscal year set forth in section 665(a)(2) of this title by amounts equal to the amounts for each fiscal year estimated pursuant to subparagraph (A).

(2) Direct spending and limited tax benefits

(A) OMB shall, for each item of new direct spending or limited tax benefit canceled from a law under section 691(a) of this title, estimate the deficit decrease caused by the cancellation of such item or benefit in that law and include such estimate as a separate entry in the report prepared pursuant to section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 902(d)].

(B) OMB shall not include any change in the deficit resulting from a cancellation of any item of new direct spending or limited tax benefit, or the enactment of a disapproval bill for any such cancellation, under this subchapter in the estimates and reports required by sections 252(b) and 254 of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 902(b) and 904].

(b) Adjustments to spending limits

After ten calendar days (excluding Sundays) after the expiration of the time period in section 691d(b)(1) of this title for expedited congressional consideration of a disapproval bill for a special message containing a cancellation of discretionary budget authority, OMB shall make the reduction included in subsection (a)(1)(B) of this section as part of the next sequester report required by section 254 of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 904].

(c) Exception

Subsection (b) of this section shall not apply to a cancellation if a disapproval bill or other law that disapproves that cancellation is enacted into law prior to 10 calendar days (excluding Sundays) after the expiration of the time period set forth in section 691d(b)(1) of this title.

(d) Congressional Budget Office estimates

As soon as practicable after the President makes a cancellation from a law under section 691(a) of this title, the Director of the Congressional Budget Office shall provide the Committees on the Budget of the House of Representatives and the Senate with an estimate of the reduction of the budget authority and the reduction in outlays flowing from such reduction of budget authority for each outyear.

§ 691d. Expedited congressional consideration of disapproval bills

(a) Receipt and referral of special message

Each special message transmitted under this subchapter shall be referred to the Committee on the Budget and the appropriate committee or committees of the Senate and the Committee on the Budget and the appropriate committee or committees of the House of Representatives. Each such message shall be printed as a document of the House of Representatives.

(b) Time period for expedited procedures

(1) There shall be a congressional review period of 30 calendar days of session, beginning on the first calendar day of session after the date on which the

special message is received in the House of Representatives and the Senate, during which the procedures contained in this section shall apply to both Houses of Congress.

(2) In the House of Representatives the procedures set forth in this section shall not apply after the end of the period described in paragraph (1).

(3) If Congress adjourns at the end of a Congress prior to the expiration of the period described in paragraph (1) and a disapproval bill was then pending in either House of Congress or a committee thereof (including a conference committee of the two Houses of Congress), or was pending before the President, a disapproval bill for the same special message may be introduced within the first five calendar days of session of the next Congress and shall be treated as a disapproval bill under this subchapter, and the time period described in paragraph (1) shall commence on the day of introduction of that disapproval bill.

(c) Introduction of disapproval bills

(1) In order for a disapproval bill to be considered under the procedures set forth in this section, the bill must meet the definition of a disapproval bill and must be introduced no later than the fifth calendar day of session following the beginning of the period described in subsection (b)(1) of this section.

(2) In the case of a disapproval bill introduced in the House of Representatives, such bill shall include in the first blank space referred to in section 691e(6)(C) of this title a list of the reference numbers for all cancellations made by the President in the special message to which such disapproval bill relates.

(d) Consideration in House of Representatives

(1) Any committee of the House of Representatives to which a disapproval bill is referred shall report it without amendment, and with or without recommendation, not later than the seventh calendar day of session after the date of its introduction. If any committee fails to report the bill within that period, it is in order to move that the House discharge the committee from further consideration of the bill, except that such a motion may not be made after the committee has reported a disapproval bill with respect to the same special message. A motion to discharge may be made only by a Member favoring the bill (but only at a time or place designated by the Speaker in the legislative schedule of the day after the calendar day on which the Member offering the motion announces to the House his intention to do so and the form of the motion). The motion is highly privileged. Debate thereon shall be limited to not more than one hour, the time to be divided in the House equally between a proponent and an opponent. The previous question shall be considered as ordered on the motion to its adoption without intervening motion. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order.

(2) After a disapproval bill is reported or a committee has been discharged from further consideration, it is in order to move that the House resolve into the Committee of the Whole House on the State of the Union for consideration of the bill. If reported and the report has been available for at least one calendar day, all points of order against the bill and against consideration of the bill are waived. If discharged, all points of order against the bill and against consideration of the bill are waived. The motion is highly privileged. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. During consideration of the bill in the Committee of the Whole, the first reading of the bill shall be dispensed with. General debate shall proceed, shall be confined to the bill, and shall not exceed one hour equally divided and controlled by a proponent and an opponent of the bill. The bill shall be considered as read for amendment under the five-minute rule. Only one motion to rise shall be in order, except if offered by the manager. No amendment to the bill is in order, except any Member if supported by 49 other Members (a quorum being present) may offer an amendment striking the reference number or numbers of a cancellation or cancellations from the bill. Consideration of the bill for amendment shall not exceed one hour excluding time for recorded votes and quorum calls. No amendment shall be subject to further amendment, except pro forma amendments for the purposes of debate only. At the conclusion of the consideration of the bill for amendment, the Committee shall rise and report the bill to the House with such amendments as may have been adopted. The previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion. A motion to reconsider the vote on passage of the bill shall not be in order.

(3) Appeals from decisions of the Chair regarding application of the rules of the House of Representatives to the procedure relating to a disapproval bill shall be decided without debate.

(4) It shall not be in order to consider under this subsection more than one disapproval bill for the same

special message except for consideration of a similar Senate bill (unless the House has already rejected a disapproval bill for the same special message) or more than one motion to discharge described in paragraph (1) with respect to a disapproval bill for that special message.

(e) Consideration in Senate

(1) Referral and reporting

Any disapproval bill introduced in the Senate shall be referred to the appropriate committee or committees. A committee to which a disapproval bill has been referred shall report the bill not later than the seventh day of session following the date of introduction of that bill. If any committee fails to report the bill within that period, that committee shall be automatically discharged from further consideration of the bill and the bill shall be placed on the Calendar.

(2) Disapproval bill from House

When the Senate receives from the House of Representatives a disapproval bill, such bill shall not be referred to committee and shall be placed on the Calendar.

(3) Consideration of single disapproval bill

After the Senate has proceeded to the consideration of a disapproval bill for a special message, then no other disapproval bill originating in that same House relating to that same message shall be subject to the procedures set forth in this subsection.

(4) Amendments

(A) Amendments in order

The only amendments in order to a disapproval bill are—

(i) an amendment that strikes the reference number of a cancellation from the disapproval bill; and

(ii) an amendment that only inserts the reference number of a cancellation included in the special message to which the disapproval bill relates that is not already contained in such bill.

(B) Waiver or appeal

An affirmative vote of three-fifths of the Senators, duly chosen and sworn, shall be required in the Senate—

(i) to waive or suspend this paragraph; or

(ii) to sustain an appeal of the ruling of the Chair on a point of order raised under this paragraph.

(5) Motion nondebatable

A motion to proceed to consideration of a disapproval bill under this subsection shall not be debatable. It shall not be in order to move to reconsider the vote by which the motion to proceed was adopted or rejected, although subsequent motions to proceed may be made under this paragraph.

(6) Limit on consideration

(A) After no more than 10 hours of consideration of a disapproval bill, the Senate shall proceed, without

intervening action or debate (except as permitted under paragraph (9)), to vote on the final disposition thereof to the exclusion of all amendments not then pending and to the exclusion of all motions, except a motion to reconsider or to table.

(B) A single motion to extend the time for consideration under subparagraph (A) for no more than an additional five hours is in order prior to the expiration of such time and shall be decided without debate.

(C) The time for debate on the disapproval bill shall be equally divided between the Majority Leader and the Minority Leader or their designees.

(7) Debate on amendments

Debate on any amendment to a disapproval bill shall be limited to one hour, equally divided and controlled by the Senator proposing the amendment and the majority manager, unless the majority manager is in favor of the amendment, in which case the minority manager shall be in control of the time in opposition.

(8) No motion to recommit

A motion to recommit a disapproval bill shall not be in order.

(9) Disposition of Senate disapproval bill

If the Senate has read for the third time a disapproval bill that originated in the Senate, then it shall be in order at any time thereafter to move to proceed to the consideration of a disapproval bill for the same special message received from the House of Representatives and placed on the Calendar pursuant to paragraph (2), strike all after the enacting clause, substitute the text of the Senate disapproval bill, agree to the Senate amendment, and vote on final

disposition of the House disapproval bill, all without any intervening action or debate.

(10) Consideration of House message

Consideration in the Senate of all motions, amendments, or appeals necessary to dispose of a message from the House of Representatives on a disapproval bill shall be limited to not more than four hours. Debate on each motion or amendment shall be limited to 30 minutes. Debate on any appeal or point of order that is submitted in connection with the disposition of the House message shall be limited to 20 minutes. Any time for debate shall be equally divided and controlled by the proponent and the majority manager, unless the majority manager is a proponent of the motion, amendment, appeal, or point of order, in which case the minority manager shall be in control of the time in opposition.

(f) Consideration in conference

(1) Convening of conference

In the case of disagreement between the two Houses of Congress with respect to a disapproval bill passed by both Houses, conferees should be promptly appointed and a conference promptly convened, if necessary.

(2) House consideration

(A) Notwithstanding any other rule of the House of Representatives, it shall be in order to consider the report of a committee of conference relating to a disapproval bill provided such report has been available for one calendar day (excluding Saturdays, Sundays, or legal holidays, unless the House is in session

on such a day) and the accompanying statement shall have been filed in the House.

(B) Debate in the House of Representatives on the conference report and any amendments in disagreement on any disapproval bill shall each be limited to not more than one hour equally divided and controlled by a proponent and an opponent. A motion to further limit debate is not debatable. A motion to recommit the conference report is not in order, and it is not in order to move to reconsider the vote by which the conference report is agreed to or disagreed to.

(3) Senate consideration

Consideration in the Senate of the conference report and any amendments in disagreement on a disapproval bill shall be limited to not more than four hours equally divided and controlled by the Majority Leader and the Minority Leader or their designees. A motion to recommit the conference report is not in order.

(4) Limits on scope

(A) When a disagreement to an amendment in the nature of a substitute has been referred to a conference, the conferees shall report those cancellations that were included in both the bill and the amendment, and may report a cancellation included in either the bill or the amendment, but shall not include any other matter.

(B) When a disagreement on an amendment or amendments of one House to the disapproval bill of the other House has been referred to a committee of conference, the conferees shall report those cancellations upon which both Houses agree and may report

any or all of those cancellations upon which there is disagreement, but shall not include any other matter.

§ 691e. Definitions

As used in this subchapter:

(1) Appropriation law

The term "appropriation law" means an Act referred to in section 105 of title 1, including any general or special appropriation Act, or any Act making supplemental, deficiency, or continuing appropriations, that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States.

(2) Calendar day

The term "calendar day" means a standard 24-hour period beginning at midnight.

(3) Calendar days of session

The term "calendar days of session" shall mean only those days on which both Houses of Congress are in session.

(4) Cancel

The term "cancel" or "cancellation" means—

(A) with respect to any dollar amount of discretionary budget authority, to rescind;

(B) with respect to any item of new direct spending—

(i) that is budget authority provided by law (other than an appropriation law), to prevent such budget authority from having legal force or effect;

(ii) that is entitlement authority, to prevent the specific legal obligation of the United States from having legal force or effect; or

(iii) through the food stamp program, to prevent the specific provision of law that results in an increase in budget authority or outlays for that program from having legal force or effect; and

(C) with respect to a limited tax benefit, to prevent the specific provision of law that provides such benefit from having legal force or effect.

(5) Direct spending

The term "direct spending" means—

(A) budget authority provided by law (other than an appropriation law);

(B) entitlement authority; and

(C) the food stamp program.

(6) Disapproval bill

The term "disapproval bill" means a bill or joint resolution which only disapproves one or more cancellations of dollar amounts of discretionary budget authority, items of new direct spending, or limited tax benefits in a special message transmitted by the President under this subchapter and—

(A) the title of which is as follows: "A bill disapproving the cancellations transmitted by the President on _____", the blank space being filled in with the date of transmission of the relevant special message and the public law number to which the message relates;

(B) which does not have a preamble; and

(C) which provides only the following after the enacting clause: "That Congress disapproves of cancellations _____", the blank space being filled in with a list by reference number of one or more cancellations contained in the President's special message, "as transmitted by the President in a special message on _____", the blank space being filled in with the appropriate date, "regarding _____.", the blank space being filled in with the public law number to which the special message relates.

(7) Dollar amount of discretionary budget authority

(A) Except as provided in subparagraph (B), the term "dollar amount of discretionary budget authority" means the entire dollar amount of budget authority—

(i) specified in an appropriation law, or the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included;

(ii) represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law;

(iii) required to be allocated for a specific program, project, or activity in a law (other than an appropriation law) that mandates the expenditure of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law;

(iv) represented by the product of the estimated procurement cost and the total quantity of items specified in an appropriation law or included in the statement of managers or the governing committee report accompanying such law; or

(v) represented by the product of the estimated procurement cost and the total quantity of items required to be provided in a law (other than an appropriation law) that mandates the expenditure of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law.

(B) The term "dollar amount of discretionary budget authority" does not include—

(i) direct spending;

(ii) budget authority in an appropriation law which funds direct spending provided for in other law;

(iii) any existing budget authority rescinded or canceled in an appropriation law; or

(iv) any restriction, condition, or limitation in an appropriation law or the accompanying statement of managers or committee reports on the expenditure of budget authority for an account, program, project, or activity, or on activities involving such expenditure.

(8) Item of new direct spending

The term "item of new direct spending" means any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending relative to the most recent levels calculated pursuant to section 907 of this title.

(9) Limited tax benefit

(A) The term "limited tax benefit" means—

(i) any revenue-losing provision which provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries under title 26 in any fiscal year for which the provision is in effect; and

(ii) any Federal tax provision which provides temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year from a change to title 26.

(B) A provision shall not be treated as described in subparagraph (A)(i) if the effect of that provision is that—

(i) all persons in the same industry or engaged in the same type of activity receive the same treatment;

(ii) all persons owning the same type of property, or issuing the same type of investment, receive the same treatment; or

(iii) any difference in the treatment of persons is based solely on—

(I) in the case of businesses and associations, the size or form of the business or association involved;

(II) in the case of individuals, general demographic conditions, such as income, marital status, number of dependents, or tax return filing status;

(III) the amount involved; or

(IV) a generally-available election under title 26.

(C) A provision shall not be treated as described in subparagraph (A)(ii) if—

(i) it provides for the retention of prior law with respect to all binding contracts or other legally enforceable obligations in existence on a date contemporaneous with congressional action specifying such date; or

(ii) it is a technical correction to previously enacted legislation that is estimated to have no revenue effect.

(D) For purposes of subparagraph (A)—

(i) all businesses and associations which are related within the meaning of sections 707(b) and 1563(a) of title 26 shall be treated as a single beneficiary;

(ii) all qualified plans of an employer shall be treated as a single beneficiary;

(iii) all holders of the same bond issue shall be treated as a single beneficiary; and

(iv) if a corporation, partnership, association, trust or estate is the beneficiary of a provision, the shareholders of the corporation, the partners of the partnership, the members of the association, or the beneficiaries of the trust or estate shall not also be treated as beneficiaries of such provision.

(E) For purposes of this paragraph, the term "revenue-losing provision" means any provision which results in a reduction in Federal tax revenues for any one of the two following periods—

(i) the first fiscal year for which the provision is effective; or

(ii) the period of the 5 fiscal years beginning with the first fiscal year for which the provision is effective.

(F) The terms used in this paragraph shall have the same meaning as those terms have generally in title 26, unless otherwise expressly provided.

(10) OMB

The term "OMB" means the Director of the Office of Management and Budget

§ 691f. Identification of limited tax benefits

(a) Statement by Joint Tax Committee

The Joint Committee on Taxation shall review any revenue or reconciliation bill or joint resolution which includes any amendment to title 26 that is being prepared for filing by a committee of conference of the two Houses, and shall identify whether such bill or joint resolution contains any limited tax benefits. The Joint Committee on Taxation shall provide to the committee of conference a statement identifying any such limited tax benefits or declaring that the bill or joint resolution does not contain any limited tax benefits. Any such statement shall be made available to any Member of Congress by the Joint Committee on Taxation immediately upon request.

(b) Statement included in legislation

(1) Notwithstanding any other rule of the House of Representatives or any rule or precedent of the Senate, any revenue or reconciliation bill or joint

resolution which includes any amendment to title 26 reported by a committee of conference of the two Houses may include, as a separate section of such bill or joint resolution, the information contained in the statement of the Joint Committee on Taxation, but only in the manner set forth in paragraph (2).

(2) The separate section permitted under paragraph (1) shall read as follows: "Section 1021(a)(3) of the Congressional Budget and Impoundment Control Act of 1974 shall _____ apply to _____.", with the blank spaces being filled in with—

(A) in any case in which the Joint Committee on Taxation identifies limited tax benefits in the statement required under subsection (a) of this section, the word "only" in the first blank space and a list of all of the specific provisions of the bill or joint resolution identified by the Joint Committee on Taxation in such statement in the second blank space; or

(B) in any case in which the Joint Committee on Taxation declares that there are no limited tax benefits in the statement required under subsection (a) of this section, the word "not" in the first blank space and the phrase "any provision of this Act" in the second blank space.

(c) President's authority

If any revenue or reconciliation bill or joint resolution is signed into law pursuant to Article I, section 7, of the Constitution of the United States—

(1) with a separate section described in subsection (b)(2) of this section, then the President may use the authority granted in section 691(a)(3) of this title only to cancel any limited tax benefit in that law, if any, identified in such separate section; or

(2) without a separate section described in subsection (b)(2) of this section, then the President may use the authority granted in section 691(a)(3) of this title to cancel any limited tax benefit in that law that meets the definition in section 691e of this title.

(d) Congressional identifications of limited tax benefits

There shall be no judicial review of the congressional identification under subsections (a) and (b) of this section of a limited tax benefit in a conference report.

§ 692. Judicial review

(a) Expedited review

(1) Any Member of Congress or any individual adversely affected by part C of title X of the Congressional Budget and Impoundment Control Act of 1974 [2 U.S.C. 691 *et seq.*] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.

(2) A copy of any complaint in an action brought under paragraph (1) shall be promptly delivered to the Secretary of the Senate and the Clerk of the House of Representatives, and each House of Congress shall have the right to intervene in such action.

(3) Nothing in this section or in any other law shall infringe upon the right of the House of Representatives to intervene in an action brought under

paragraph (1) without the necessity of adopting a resolution to authorize such intervention.

(b) Appeal to Supreme Court

Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1) of subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 calendar days after such order is entered; and the jurisdictional statement shall be filed within 30 calendar days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1) of subsection (a) of this section shall be issued by a single Justice of the Supreme Court.

(c) Expedited consideration

It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a) of this section.

APPENDIX D

62 Fed. Reg. 43262:

NOTICES

OFFICE OF MANAGEMENT AND BUDGET

Cancellation Pursuant to Line Item Veto Act;
Balanced Budget Act of 1997

Tuesday, August 12, 1997

August 11, 1997.

Dear Mr. President: In accordance with the Line Item Veto Act, I hereby cancel one item of new direct spending, as specified in the attached report, contained in the "Balanced Budget Act of 1997" (Public Law 105-33; H.R. 2015). I have determined that this cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachment, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Albert Gore, Jr.,
President of the Senate,
Washington, D.C. 20510.

August 11, 1997

Dear Mr. Speaker: In accordance with the Line Item Veto Act, I hereby cancel one item of new direct spending, as specified in the attached report, contained in the "Balanced Budget Act of 1997" (Public Law 105-33; H.R. 2015). I have determined that this cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachment, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Newt Gingrich,
Speaker of the House of Representatives,
Washington, D.C. 20515.

Cancellation No. 97-3

CANCELLATION OF ITEM OF NEW DIRECT SPENDING

Report Pursuant to the Line Item Veto Act, P.L. 104-130

Bill Citation: "Balanced Budget Act of 1997" (H.R. 2015)

1(A). Limited of New Direct Spending: Section 4722(c). Subsection(c), "Waiver of Certain Provider Tax Provisions", of Section 4722, "Treatment of State Texas Imposed on Certain Hospitals", is canceled in its entirety. The remainder of Section 4722 is not canceled.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Programs: In the past, Federal Medicaid spending increased dramatically because some States used disproportionate share hospital payments and related special financing mechanisms such as levying taxes on health care providers to effectively lower their share of Medicaid spending. Lowering a State's share of Medicaid spending allows the State to generate additional revenues that can potentially be used for non-Medicaid purposes. In 1991, Congress limited the

growth in Medicaid spending by enacting legislation to restrict the ability of States to use certain types of provider taxes as their share of Medicaid spending. *See* Section 1903(w) of the Social Security Act, 42 U.S.C. 1296b(w). Congress required that provider taxes be uniform and broad-based in order to qualify as a State's "matching" funds. The canceled item would have deemed taxes, fees, or assessments that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver has been applied for, to be permissible health care related taxes in compliance with the requirements of Medicaid law. The canceled item, which would have constituted new direct spending, would have given preferential treatment to only one State (New York), by allowing that State to continue relying upon impermissible provider taxes to finance its Medicaid program. This preferential treatment would have increased Medicaid costs, would have treated New York differently from all other States, and would have established a costly precedent for other States to request comparable treatment. The legislative history and purposes of this provision were considered, but did not outweigh the foregoing reasons for cancellation.

1(D). Estimated Fiscal, Economic, and Budgetary Effect of Cancellation: As a result of the cancellation, Federal outlays will not increase, as specified below. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

62 Fed. Reg. 43262-01:

Cancellation No. 97-3 (p.2)

Outlay Changes (in billions of dollars)[1]

FY 1998	FY 1999	FY 2000	FY2001	FY-2202	Total
-$0.2	0	0	0	0	$0.2

1(F). Adjustments to Discretionary Spending Limits: Not Applicable

2(A). Agency: Department of Health and Human Services
2(A). Bureau: Health Care Financing Administration
2(A). Governmental Function (Account):
Medicaid (Grants to States for Medicaid)

2(B). States and Congressional Districts Affected:
New York and all Congressional Districts in New York.
2(C). Total Number of Cancellations (inclusive) in current Sesions in each State and District identified above:
One

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[1] Based on CBO estimates. Final Administration scoring may vary.

62 Fed. Reg. 43265:

NOTICES

OFFICE OF MANAGEMENT AND BUDGET

Cancellation Pursuant to Line Item Veto Act;
Taxpayer Relief Act of 1997

Tuesday, August 12, 1997

August 11, 1997.

Dear Mr. President: In accordance with the Line Item Veto Act, I hereby cancel two limited tax benefits, as specified in the attached reports, contained in the "Taxpayer Relief Act of 1997" (Public Law 105-34; H.R. 2014). I have determined that each of these cancellations will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachments, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Albert Gore, Jr.,
President of the Senate,
Washington, D.C. 20510.

August 11, 1997

Dear Mr. Speaker: In accordance with the Line Item Veto Act, I hereby cancel two limited tax benefits, as specified in the attached reports, contained in the "Taxpayer Relief Act of 1997" (Public Law 105-34; H.R. 2014). I have determined that each of these cancellations will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachments, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Newt Gingrich,
Speaker of the House of Representatives,
Washington, D.C. 20515.

Cancellation No. 97-1

CANCELLATION OF LIMITED TAX BENEFIT

Report Pursuant to the Line Item Veto Act, P.L. 104-130

Bill Citation: "Taxpayer Relief Act of 1997" (H.R. 2014)

1(A). Limited Tax Benefit: Section 1175. This item is identified as a limited tax benefit at Section 1701(54) of the bill. Section 1175, "Exemption for Active Financing Income", is canceled in its entirety.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Programs: Prior to 1987, income earned in connection with the active conduct of foreign financial services businesses, including interest, dividends and certain gains, generally was exempt from current U.S. tax. However, the Tax Reform Act of 1986 eliminated or curtailed this benefit based on serious concerns regarding the mobility of such income and the case with which financial services entities could shift income to tax-haven jurisdictions. *See* P.L. 99-514, section 1221(a)(1). The canceled item would have enacted a new exemption for such income for a single year (1998), and would have addressed adequately the concerns that led to the repeal of the prior exemption in 1986. The one-year restoration of an exemption for this income would have decreased Federal receipts, would have allowed the tax-haven abuses that previously existed, and would have provided preferential tax treatment to a limited group of taxpayers. The legislative history and purposes of this provision were considered, but did not outweigh the foregoing reasons for cancellation.

1(D). Estimated Fiscal, Budgetary, and Economic Effect of Cancellation: As a result of the cancellation, Federal receipts will not decrease by an estimated $317 million over 5 years. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

1(F). Adjustments to Discretionary Spending Limits: Not applicable.

Cancellation No. 97-2

CANCELLATION OF LIMITED TAX BENEFIT

Report Pursuant to the Line Item Veto Act, P.L. 104-130

Bill Citation: "Taxpayer Relief Act of 1997" (H.R. 2014)

1(A). Limited Tax Benefit. Section 968. This item is identified as a limited tax benefit at Section 1701(30) of the bill. Section 968, "Nonrecognition of Gain on Sale of Stock to Certain Farmers' Cooperatives", is canceled in its entirety.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Program: The canceled item would have allowed deferral of gain recognition on the sale of certain corporate stock of farm-product refiners and processors to an eligible farmers' cooperative, thereby providing an exception to the general rule that gain is recognized when stock is sold. Under current law, gain deferral is permitted on the sale of qualified securities of a corporation to an employee stock ownership plan (ESOP) or an eligible worker-owned cooperative; however, these provisions of current law contain appropriate restrictions that would not have applied to transactions

covered by the canceled item, notably restrictions that the seller's stock must not be traded on a securities market and that the seller must not be a corporation. While the Administration wants to encourage value-added farming through the purchase by farmers' cooperatives of refiners or processors of agricultural goods, the cancellation of this provision is nonetheless compelled by two narrow but important considerations. First, the canceled item would have created opportunities for complete avoidance of tax on the gain from a sale of a refiner or processor because it lacks the safeguards that apply to sales of stock to ESOPs. Second, this provision failed to target its benefits to small-and-medium-size cooperatives. The canceled item would not have benefitted farmers generally would have decreased Federal receipts, would have created opportunities for abusive tax planning, and would have provided preferential tax treatment to a limited group of taxpayers. The legislative history and purposes of this provision were considered, but did not outweigh the foregoing reasons for cancellation.

1(D). Estimated Fiscal, Budgetary, and Economic Effect of Cancellation: As a result of the cancellation, Federal receipts will not decrease by an estimated $98 million over 5 years and $155 million over 10 years. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

1(F). Adjustments to Discretionary Spending Limits: Not applicable.

APPENDIX E

1. Section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 515, provides as follows:

WAIVER OF CERTAIN PROVIDER TAX PROVISIONS.—Notwithstanding any other provision of law, taxes, fees, or assessments, as defined in section 1903(w)(3)(A) of the Social Security Act (42 U.S.C. 1396b(w)(3)(A), that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver of the provisions of subparagraph (B) or (C) of section 1903(w)(3) of such Act has been applied for, or that would, but for this subsection require that such waiver be applied for, in accordance with subparagraph (E) of such section, and, (if so applied for) upon which action by the Secretary of Health and Human Services (including any judicial review of any such proceeding) has not been completed as of July 23, 1997, are deemed to be permissible health care related taxes and in compliance with the requirements of subparagraphs (B) and (C) of section 1903(w)(3) of such Act.

2. Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 895-896, provides as follows:

NONRECOGNITION OF GAIN ON SALE OF STOCK TO CERTAIN FARMERS' COOPERATIVES/

(a) IN GENERAL.—Section 1042 (relating to sales of stock to employee stock ownership plans or

certain cooperatives) is amended by adding at the end the following new subsection:

"(g) APPLICATION OF SECTION TO SALES OF STOCK IN AGRICULTURAL REFINERS AND PROCESSORS TO ELIGIBLE FARM COOPERATIVES.—

"(1) IN GENERAL.—This section shall apply to the sale of stock of a qualified refiner or processor to an eligible farmers' cooperative.

"(2) QUALIFIED REFINER OR PROCESSOR.—For purposes of this subsection, the term 'qualified refiner or processor' means a domestic corporation—

"(A) substantially all of the activities of which consist of the active conduct of the trade or business of refining or processing agricultural or horticultural products, and

"(B) which, during the 1-year period ending on the date of the sale, purchases more than one-half of such products to be refined or processed from—

"(i) farmers who make up the eligible farmers' cooperative which is purchasing stock in the corporation in a transaction to which this subsection is to apply, or

"(ii) such cooperative.

"(3) ELIGIBLE FARMERS' COOPERATIVE.—For purposes of this section, the term 'eligible farmers' cooperative' means an organization to which part I of subchapter T applies and which is engaged in the marketing of agricultural or horticultural products.

"(4) SPECIAL RULES.—In applying this section to a sale to which paragraph (1) applies—

"(A) the eligible farmers' cooperative shall be treated in the same manner as a cooperative described in subsection (b)(1)(B),

"(B) subsection (b)(2) shall be applied by substituting '100 percent' for '30 percent' each place it appears,

"(C) the determination as to whether any stock in the domestic corporation is a qualified security shall be made without regard to whether the stock is an employer security or to subsection (c)(1)(A), and

"(D) paragraphs (2)(D) and (7) of subsection (c) shall not apply."

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to sales after December 31, 1997.